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SUBJECT: ICAO: SECOND MEETING OF THE SPECIAL LEGAL SUB-COMMITTEE ON  
THE PREPARATION OF ONE OR MORE INSTRUMENTS ADDRESSING NEW AND  
EMERGING THREATS

REFS: A) STATE 013631 B) STATE 017530 (NOTAL)

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11. (U) SUMMARY: The International Civil Aviation Organization (ICAO) Special Legal Sub-Committee on New and Emerging Threats met a second time (February 19-21, 2008) to consider the issue of unlawful transport by air of particularly dangerous goods and related items and fugitives, as directed by a November 28, 2007 decision of the ICAO Council (see ref A). The Sub-Committee agreed to incorporate "transport of materials" offenses into the draft amendment to the Montreal Convention, using substantively identical text as that included in the 2005 Protocol to the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA). The Sub-Committee did not reach consensus on whether the amendment to the Montreal Convention should include a fugitives transport offense; however, it was agreed that such a provision would be added in brackets for future consideration. The ICAO Secretariat plans to prepare new draft texts of both the Hague and Montreal Conventions and to seek an ICAO Council decision on whether the draft is ready to forward to the entire ICAO Legal Committee. END SUMMARY.

12. (U) TRANSPORT OFFENSES:

a. Explosives, radioactive material, WMD and related items: The Sub-Committee considered two options, proposed by Australia, for incorporating transport offenses into the draft amendment to the Montreal Convention: Option A would adapt for aviation purposes the text in the 2005 SUA Protocol. Option B would criminalize unlawful transport of "high consequence dangerous goods" as defined in Annex 18 to the Chicago Convention. The U.S. delegation (per ref B guidance) supported Option A. Eleven other states spoke; all supported inclusion of transport offenses for WMD and related items, either in general or specifically via Option A. No country supported Option B. Below is additional background on the discussion of the "transport of materials" offense provisions:

-- India submitted a working paper claiming the SUA Protocol provisions would implicate innocent persons and discriminate against non-parties to the Nuclear Non-Proliferation Treaty (NPT). In the course of the meetings, India specifically proposed replacing the term "an IAEA comprehensive safeguards agreement" with "a respective safeguards agreement" or "a safeguards agreement with the IAEA" in

the transport offenses text. India claimed that the exemptions in the SUA Protocol for nuclear dual-use transfers consistent with the NPT applied only to nuclear weapons states-parties to the NPT. South Africa pointed out that the Montreal Convention only criminalizes "unlawful" activities, and an activity conducted under any safeguards agreement would not be unlawful. Other countries asked for time to study India's proposal; therefore the phrases were placed in brackets.

-- During discussion of the elements of the offense of transport of explosives or radioactive material, Canada stated that the amendment should not cover the failure to obtain a license for otherwise lawful exports of explosives or conventional arms. The U.S. delegation agreed. Nevertheless, no agreement was reached on whether to include the terrorist object/purpose element for this offense (as used in the SUA Protocol), or delete it, or replace it with alternate wording.

-- China (two CAAC officials) expressed numerous concerns about incorporating transport offenses during a February 18 bilateral meeting with the U.S. delegation. Following U.S. explanations, however, China supported the effort during the Sub-Committee meetings. China expressed concern regarding the applicability of the amendment to state aircraft, noting that there is no standard definition of what a state aircraft is. China wants to ensure that the offenses would apply only to civil aircraft, and said it might raise this issue again in the future.

b. Fugitives: Australia also had proposed inclusion of an offense provision requiring criminalization of the act of transporting a fugitive on board an aircraft with the knowledge that the person has committed a terrorist act and the intent of assisting the person in evading prosecution. The text would be substantively the same as the "transport of fugitives" provision in the 2005 SUA Protocol. Four countries, including the United States, supported inclusion of such a provision in the amendment to the Montreal Convention, while eight countries made negative comments. The Chair (Thierry Olson of France) decided to insert the provision with brackets.

13. (SBU) MILITARY EXCLUSION CLAUSE: Lebanon repeated its concerns and/or opposition to the standard military carve-out included in the amendments to The Hague and Montreal Conventions in July 2007. Lebanon's representative asked for clarity as to what other rules of international law would apply to military forces, since these Conventions would not apply. The Chair noted that the provisions used standard wording from many other international counterterrorism conventions and that it had received broad support in July 2007. The Chair did not bracket any portion of the military exclusion provisions, but agreed to reflect Lebanon's comments in the Minutes. No other countries spoke on the military carve-out, and the U.S. Delegation did not consider a U.S. intervention necessary given the Chair's comments.

14. (U) CONSPIRACY OFFENSE: Japan opposed applicability of the conspiracy/criminal association offense provision, agreed upon by the Sub-Committee in July 2007, to the transport offense provisions. The Japanese delegation was confident of Japan's ability to implement domestically a conspiracy provision applicable to the non-transport offense provisions in the Montreal Convention and draft amendment. However, Japan did not think it would be able to implement a conspiracy provision that applied to transport offenses since "transport," itself, could be viewed as a preparatory act. The Chair objected to revising text that was agreed at the Sub-Committee's first meeting in July 2007, but agreed to note Japan's concerns in the report on the Sub-Committee proceedings. (In a bilateral meeting with Japan on this issue, the U.S. delegation reiterated its view of the importance of extending the conspiracy provision to transport offenses and noted its willingness to work with the Japanese to find an acceptable solution. Japan informed the U.S. delegation that a draft anti-conspiracy law is being held up in Japan's parliament, hampering Japan's ability to accede to any international conventions that criminalize conspiracy.)

15. (U) FORM OF AMENDMENT: Three options were discussed for the form of the amendments to The Hague and Montreal Conventions: (1)

protocols to both Conventions, (2) new consolidated texts of both Conventions, and (3) protocols along with unofficial new consolidated texts. The Sub-Committee did not reach agreement on which form the amendments should ultimately take.

¶6. (U) NEXT STEPS: The Sub-Committee discussed whether it needed to meet again before submitting draft texts to the entire Legal Committee. (Such a meeting could take place in September or October 2008). Senegal and IATA (the global air carrier industry association) supported a third meeting. Five countries, including the United States, opposed another meeting. The Chair indicated that, since there was not clear consensus, this issue would be referred to the ICAO Council for a decision sometime in March. (Only the Council has authority to schedule a meeting of the Legal Sub-Committee and allocate funding for it. USICAO plans to work with like-minded Council members to express objection to another Sub-Committee meeting in order that ICAO, in a tight budget climate, can save money, and to avoid protracted discussion of some of the more contentious issues.)

¶7. (U) PARTICIPANTS: The Legal Sub-Committee members that attended the meetings were: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Italy, Japan, Lebanon, Nigeria, Russia, Senegal, Singapore, South Africa, Switzerland, United Kingdom, and United States. Legal Sub-Committee members Egypt, Finland, Jordan, Mexico, and the UAE did not attend. At their request, Colombia, the Dominican Republic, Greece, South Korea, Turkey, Uruguay, and the International Air Transport Association (IATA) were allowed to attend as observers.

Bliss Marshall